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SUPREME COURT OF THE [illegible]

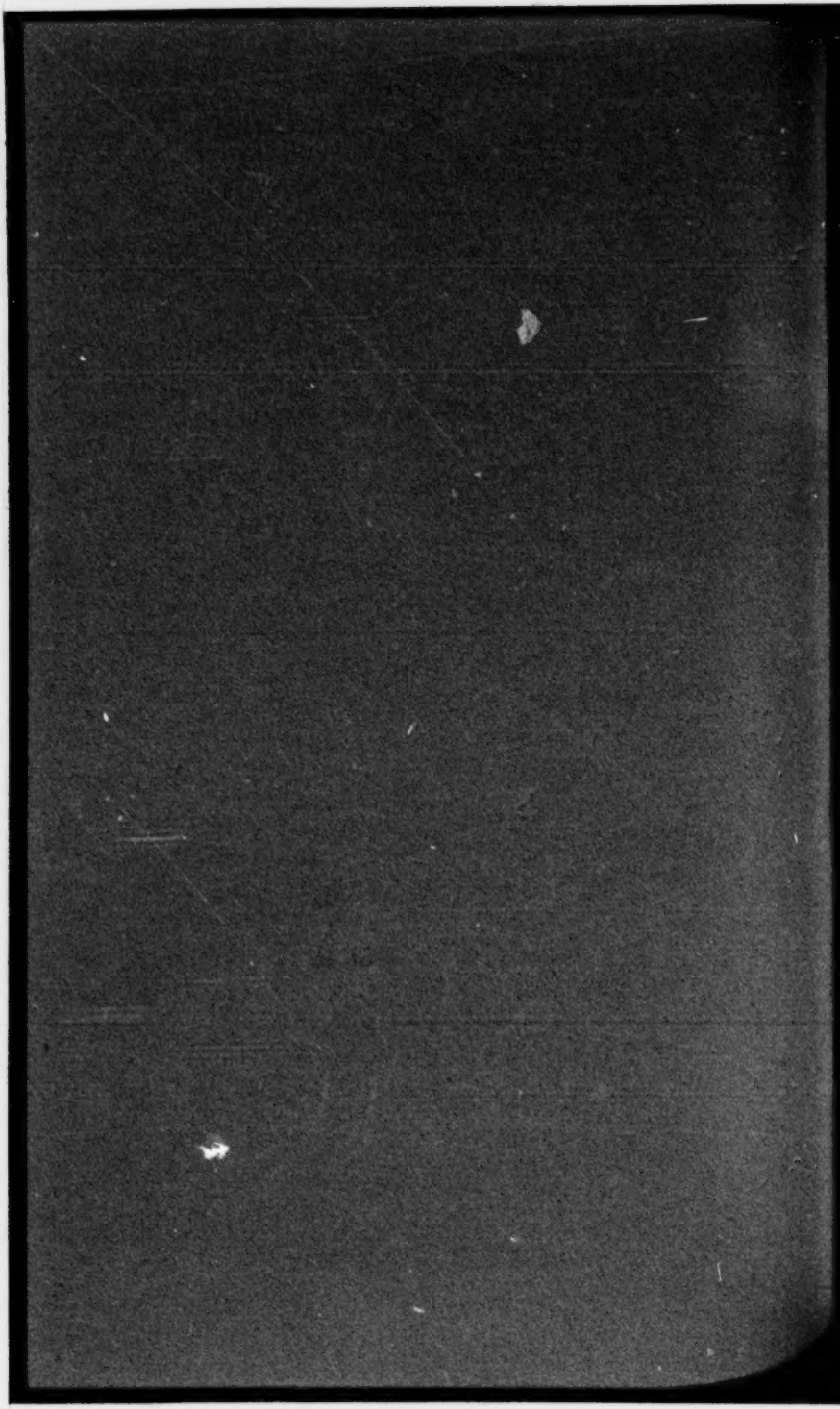
OCTOBER TERM, 1942.

WM. J. LEMP BREWING COMPANY,
Petitioner,
v.
EMS BREWING COMPANY,
Respondent.
No. 854.

REPLY BRIEF OF PETITIONER.

SAMUEL H. LIBERMAN,
705 Olive Street,
St. Louis, Missouri,
BRUCE A. CAMPBELL,
First National Bank Building,
East St. Louis, Illinois,
GIDEON H. SCHILLER,
705 Olive Street,
St. Louis, Missouri,
EDWARD P. FELKER,
1411 Pennsylvania N. W.,
Washington, D. C.,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 6477.



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Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

WM. J. LEMP BREWING COMPANY, Petitioner, v. EMS BREWING COMPANY, Respondent.	No. 634.

REPLY BRIEF OF PETITIONER.

I.

The Importance of the Questions Presented.

Respondent concedes that under the conflict of laws rule of Illinois the construction of the contract was governed by the law of the State where the contract was made, or, if the contract was to be wholly performed in one state by the law of the State where this performance was to occur, the respondent further concedes that the pleadings upon which it sought and obtained judgment did not disclose where the contract was executed or where it was to be performed.

In the light of these concessions the respondent could not, and it does not, take issue with petitioner's claim that the record upon which the judgment was based afforded no basis for the ascertainment of the appropriate State law.

Respondent urges this Court to refrain from exercising its discretionary power to review a judgment based upon such a record upon the ground that the litigation is private and that no important questions are involved.

We cannot deny that the litigation is private but in that respect it does not differ from the controversy that existed between Mr. Tompkins and the Erie Railroad Company. The liability of the Erie Railroad Company to Tompkins was not a matter of transcendent public interest but the **principle** upon which that liability was to be ascertained was a matter of grave importance.

We realize that the question of respondent's liability to petitioner is not per se a matter of concern to this Court but we submit that the evident, almost confessed, **departure** from the **principle** established by this Court is important.

To say, as does the respondent, that no important federal question is involved where a federal court enters a judgment in a diversity case under circumstances which made it impossible for that court to ascertain the appropriate State law is to ignore entirely the fact that this Court has declared it to be beyond the constitutional power of a federal court to decide questions of substantive law except in accordance with the appropriate State law.

The respondent has not cited a single authority sustaining the power and right of a federal court, since the decision in the Erie case, to enter a judgment where the record before the court fails to afford the basis for the ascertainment of the appropriate State law.

If the doctrine of the Erie case is to be qualified so as to permit District Courts in diversity cases to determine questions of substantive law upon pleadings which do not provide a basis for the ascertainment of the appropriate

State law, and so as to permit Circuit Courts of Appeals to affirm judgments upon a consideration of various potential State laws, the qualification should be only with the express approval of this Court.

II.

In a Federal Court Judgment on the Pleadings Cannot Be Based Upon a Presumption That the Governing Law Is the Law of the Forum.

Respondent advances a contention, not heretofore made either in the District Court or in the Circuit Court of Appeals, that since petitioner did not allege where the contract was made or where it was to be performed the federal court sitting in Illinois would be required to apply the common law of Illinois.

In this connection respondent cites Mutual Life Ins. Co. v. Divine, 180 Ill. App. 422, in which the court held that where the proof did not show where a contract was made and where there was neither allegation or proof of the law of another state, the common law would be applied in construing the contract.

Erie Railroad Co. v. Tompkins required federal courts to apply the substantive appropriate State law but did not require the federal courts to follow the State law in procedural matters.

Prior to Erie v. Tompkins the federal courts took judicial notice of the laws of all the States and it has been held that this rule has not been affected by the Erie decision.

Gallup v. Caldwell (C. C. A. 3), 120 F. 2d 90;
Alcara v. Jordeau (C. C. A. 3), 138 F. 2d 769.

In fact, the Circuit Court of Appeals in the case at bar has so ruled (R. 56).

Petitioner was not required to plead the law of Missouri and on the trial of the case would not have been required to make proof of the law of Missouri.

It was not necessary for the petitioner to plead that the contract was executed in Missouri or that it was to be performed in Missouri, since these allegations were not essential.

If respondent desired to have the pleadings show the place of execution or the place of performance it was at liberty to move the Court for a more definite statement or for a bill of particulars.

Respondent moreover was at liberty to file in conjunction with its motion for judgment on the pleadings an affidavit as to the place of execution or the place of performance. Petitioner then could have filed, if necessary, counter affidavits.

Obviously the respondent seeking judgment on the pleadings had the burden of showing his clear right to such judgment as a matter of law and since there can be no law in a diversity case other than "the appropriate State law" that burden could not have been met except upon proof by the respondent of the facts essential to a determination of the appropriate state law. The fact to be established was the place of execution of the contract or the place of performance coupled with proof that performance was to be confined to one state.

Respondent intimates (p. 14 Respondent's Brief) that the claim now asserted by petitioner is an afterthought. Yet in the opening paragraph of its brief respondent admits that the Statement of petitioner is substantially correct (p. 1 Respondent's Brief). In that statement so admitted to be substantially correct the petitioner asserted that it had advised the District Court in connection with its argument that any ruling on the motion would be pre-

mature "for the reason that the record did not disclose the place of execution of the contract" and that "under the pleadings plaintiff is at liberty to prove and expects to prove that in point of fact the contract was entered into in the City of St. Louis, Missouri," and that "Nothing on the face of the contract purports to limit its performance by any one of the parties to any one state" (pp. 6-7 Petition for Writ).

These statements are not challenged and cannot be challenged by the respondent because they were made at the outset in briefs served on the respondent and filed with the District Court.

It is said that petitioner did not seek to amend its pleading. Obviously the purpose of such an amendment would be to advise the District Court and the respondent of petitioner's position and claim. That had already been done in clear, unmistakable and unequivocal language.

Respondent with full knowledge of petitioner's claim pressed its motion for judgment on the pleading and the District Court with full knowledge thereof entered judgment for the respondent.

In its appeal from that judgment the petitioner in its statement of points reiterated its claim as follows:

> "4. The court erred in passing upon the sufficiency of the complaint without hearing evidence as to the place of execution of the contract referred to in the complaint and without making findings of fact based upon evidence as to the place of execution of said contract (R. 39).
>
> "5. The law applicable to the construction of the contract referred to in the complaint could not be determined and ascertained in the absence of proof

as to the place of the execution of the contract" (R. 39).

Petitioner from the outset has claimed that under the binding and controlling decisions of this Court its rights can be ascertained only in accordance with the appropriate State law; that the appropriate State law is the law of the State where the contract was executed; that it was beyond the power of the District Court to enter judgment upon the pleadings because the pleadings did not disclose where the contract was executed; that the action of the District Court and of the Circuit Court of Appeals have deprived petitioner of the right to have its case determined in accordance with the law of the land as declared by its highest court.

Petitioner's fundamental rights have been invaded by the judgment below and this Court's writ of certiorari should issue to review petitioner's claim.

Respectfully submitted,

SAMUEL H. LIBERMAN,
705 Olive Street,
St. Louis, Missouri,

BRUCE A. CAMPBELL,
First National Bank Building,
East St. Louis, Illinois,

GIDEON H. SCHILLER,
705 Olive Street,
St. Louis, Missouri,

EDWARD P. FELKER,
1411 Pennsylvania N. W.,
Washington, D. C.,

Attorneys for Petitioner.